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5 **UNITED STATES DISTRICT COURT**
6 **EASTERN DISTRICT OF WASHINGTON**

7 BRANDON CURTIS FERREL,

8 Plaintiff,

9 vs.

10 COMMISSIONER OF SOCIAL

11 SECURITY,

12 Defendant.

No. 2:16-CV-00126-MKD

ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

ECF Nos. 18, 20

13 BEFORE THE COURT are the parties' cross-motions for summary
14 judgment. ECF Nos. 18, 20. The parties consented to proceed before a magistrate
15 judge. ECF No. 7. The Court, having reviewed the administrative record and the
16 parties' briefing, is fully informed. For the reasons discussed below, the Court
17 denies Plaintiff's motion (ECF No. 18) and grants Defendant's motion (ECF No.
18 20).

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ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND
GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT - 1

JURISDICTION

The Court has jurisdiction over this case pursuant to 42 U.S.C. § 1383(c)(3).

STANDARD OF REVIEW

A district court’s review of a final decision of the Commissioner of Social Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is limited; the Commissioner’s decision will be disturbed “only if it is not supported by substantial evidence or is based on legal error.” *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012). “Substantial evidence” means “relevant evidence that a reasonable mind might accept as adequate to support a conclusion.” *Id.* at 1159 (quotation and citation omitted). Stated differently, substantial evidence equates to “more than a mere scintilla[,] but less than a preponderance.” *Id.* (quotation and citation omitted). In determining whether the standard has been satisfied, a reviewing court must consider the entire record as a whole rather than searching for supporting evidence in isolation. *Id.*

In reviewing a denial of benefits, a district court may not substitute its judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001). If the evidence in the record “is susceptible to more than one rational interpretation, [the court] must uphold the ALJ’s findings if they are supported by inferences reasonably drawn from the record.” *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court “may not reverse an

ALJ's decision on account of an error that is harmless." *Id.* An error is harmless "where it is inconsequential to the [ALJ's] ultimate nondisability determination." *Id.* at 1115 (quotation and citation omitted). The party appealing the ALJ's decision generally bears the burden of establishing that it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

THREE-STEP PROCESS FOR CHILDHOOD DISABILITY

To qualify for Title XVI supplement security income benefits, a child under the age of eighteen must have "a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 1382c(a)(3)(C)(i). The regulations provide a three-step process to determine whether a claimant satisfies the above criteria. 20 C.F.R. § 416.924(a). First, the ALJ must determine whether the child is engaged in substantial gainful activity. 20 C.F.R. § 416.924(b). Second, the ALJ considers whether the child has a "medically determinable impairment that is severe," which is defined as an impairment that causes "more than minimal functional limitations." 20 C.F.R. § 416.924(c). Finally, if the ALJ finds a severe impairment, the ALJ must then consider whether the impairment "medically equals" or "functionally equals" a disability listed in the "Listing of Impairments." 20 C.F.R. § 416.924(c)-(d).

1 If the ALJ finds that the child's impairment or combination of impairments
2 does not meet or medically equal a listing, the ALJ must determine whether the
3 impairment or combination of impairments functionally equals a listing. 20 C.F.R.
4 § 416.926a(a) (2011).¹ The ALJ's functional equivalence assessment requires the
5 ALJ to evaluate the child's functioning in six "domains." These six domains,
6 which are designed "to capture all of what a child can or cannot do," are as
7 follows:

- 8 (1) Acquiring and using information;
- 9 (2) Attending and completing tasks;
- 10 (3) Interacting and relating with others;
- 11 (4) Moving about and manipulating objects;
- 12 (5) Caring for self; and
- 13 (6) Health and physical well-being.

14 20 C.F.R. § 416.926a(b)(1)(i)-(vi) (2011). A child's impairment will be deemed to
15 functionally equal a listed impairment if the child's condition results in a "marked"

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17 ¹ As of March 27, 2017, 20 C.F.R. § 416.926a(a) was amended. The ALJ rendered
18 his decision on April 29, 2014, thus, the Court applies the version effective June
19 13, 2011.

1 limitations in two domains, or an “extreme” limitation in one domain. 20 C.F.R.
2 § 416.926a(a) (2011). An impairment is a “marked limitation” if it “interferes
3 seriously with [a person’s] ability to independently initiate, sustain, or complete
4 activities.” 20 C.F.R. § 416.926a(e)(2)(i) (2011). By contrast, an “extreme
5 limitation” is defined as a limitation that “interferes very seriously with [a
6 person’s] ability to independently initiate, sustain, or complete activities.” 20
7 C.F.R. § 416.926a(e)(3)(i) (2011).

8 **ALJ’S FINDINGS**

9 The Secretary of the Washington State Department of Social and Health
10 Services protectively applied for Title XVI supplemental security income benefits
11 on April 12, 2012,² on behalf of Plaintiff, a minor child, alleging a disability onset
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16 ² There is a discrepancy in the record regarding the application date. The ALJ
17 indicated the application was filed April 2, 2012. Tr. 20, 34; *see also* ECF No. 20
18 at 2. However, both the application itself, Tr. 150-59, and Plaintiff’s brief, ECF
19 No. 18 at 1, cite an application date of April 12, 2012. The Court notes that the
20 dates does not impact the determination of benefits.

1 date of August 17, 1996.³ Tr. 150-59. The application was denied initially, Tr. 90-
2 93, and on reconsideration, Tr. 100-03. Plaintiff appeared at a hearing before an
3 administrative law judge (ALJ) on April 22, 2014. Tr. 45-68. On April 29, 2014,
4 the ALJ denied Plaintiff's claim. Tr. 20-34.

5 At step one of the sequential evaluation process, the ALJ found Plaintiff had
6 not engaged in substantial gainful activity since April 2, 2012, the date the
7 application was filed. Tr. 23. At step two, the ALJ found Plaintiff has the
8 following severe impairment: cognitive disorder, not otherwise specified with
9 attention deficits. Tr. 23. At step three, the ALJ found that Plaintiff does not have
10 an impairment or combination of impairments that meets or medically equals a
11 listed impairment. Tr. 23. The ALJ then determined Plaintiff does not have an
12 impairment or combination of impairments that functionally equals the severity of
13 the listings. Tr. 23. As a result, the ALJ concluded that Plaintiff has not been
14 disabled, as defined in the Social Security Act, since April 2, 2012, the date the
15 application was filed. Tr. 34.

16 _____
17 ³ The record indicates Plaintiff's claim was previously allowed; however, when
18 Plaintiff's father was incarcerated, Plaintiff was placed into foster care and SSI
19 ended, necessitating the current reapplication. Tr. 49, 61.

1 On February 23, 2016, the Appeals Council denied review, Tr. 1-3, making
2 the Commissioner's decision final for purposes of judicial review. *See* 42 U.S.C. §
3 1383(c)(3); 20 C.F.R. §§ 416.1481, 422.210.

4 ISSUES

5 Plaintiff seeks judicial review of the Commissioner's final decision denying
6 him supplemental security income benefits under Title XVI of the Social Security
7 Act. ECF No. 18. Plaintiff raises the following issues for this Court's review:

8 1. Whether the ALJ properly determined that Plaintiff's impairments did
9 not functionally equal a listed impairment; and

10 2. Whether the ALJ properly weighed the medical opinion evidence.
11 ECF No. 18 at 8.

12 DISCUSSION

13 A. Impairments that Meet or Functionally Equal a Listed Impairment

14 First, Plaintiff contends that the ALJ erred by failing to find that Plaintiff's
15 impairments meet or functionally equal a listed impairment. ECF No. 18 at 8-14.
16 Specifically, Plaintiff alleges he suffers marked impairment in four of the six
17 domains. Plaintiff further contends that in failing to find marked limitations in at
18 least two domains, the ALJ failed to appropriately weigh medical evidence. *Id.*

19 The ALJ is responsible for deciding functional equivalence after
20 consideration of all evidence submitted. 20 C.F.R. § 416.926a(n) (2011). The

1 Regulations list the information and factors that will be considered in determining
2 whether a child’s impairment functionally equals a Listing. 20 C.F.R. § 416.926a
3 (2011); 20 C.F.R. §§ 416.924a (2011); 416.924b. In making this determination,
4 the Commissioner considers test scores together with reports and observations of
5 school personnel and others. 20 C.F.R. §§ 416.924a(a), 416.926a(e)(4)(ii) (2011).
6 The ALJ also considers how much extra help the child needs, how independent he
7 is, how he functions in school, and the effects of treatment, if any. 20 C.F.R. §
8 416.926a(b) (2011). In evaluating this type of information, the ALJ will consider
9 how the child performs activities as compared to other children his age who do not
10 have impairments. 20 C.F.R. § 416.926a(b) (2011). This information comes from
11 examining and non-examining medical sources as well as “other sources,” such as
12 parents, teachers, case managers, therapists, and other non-medical sources who
13 have regular contact with the child. *See, e.g.*, 20 C.F.R. § 416.913(c)(3), (d);
14 Social Security Ruling (SSR) 98-1p, IV.B. (Sources of Evidence).

15 As the ALJ noted, a child has a “marked limitation” in a domain when his
16 impairment “interferes seriously” with the ability to independently initiate, sustain,
17 or complete activities. Tr. 3 (citing 20 C.F.R. § 416.926a(e)(2) (2011)). A child’s
18 day-to-day functioning may be seriously limited when the impairment limits only
19 one activity or when the interactive and cumulative effects of the impairments limit

1 several activities. Tr. 3 (citing § 416.926a(e)(2) (2011)). The regulations explain
2 that a “marked” limitation also means:

- 3 1. A limitation that is “more than moderate” but “less than extreme.”
- 4 2. The equivalent of functioning that would be expected on standardized
5 testing with scores that are at least two, but less than three, standard
6 deviations below the mean.
- 7 3. A valid score that is two standard deviations or more below the mean,
8 but less than three standard deviations, on a comprehensive
9 standardized test designed to measure ability or functioning in that
10 domain, and his day-to-day functioning in domain-related activities is
11 consistent with that score.

12 20 C.F.R. § 416.926a(e)(2) (2011).

13 Plaintiff contends the ALJ should have found marked limitations in four
14 domains: acquiring and using information; attending and completing tasks;
15 interacting and relating with others; and caring for self. ECF No. 18 at 11.⁴

16 *1. Acquiring and Using Information*

17 The ALJ found less than a marked limitation in this domain. Tr. 29. The
18 domain of “acquiring and using information” is concerned with how well a child
19 acquires and learns information, and how well the child uses the information
20 _____

⁴ Because Plaintiff does not challenge the ALJ’s finding that he suffers no
limitations in the domains of moving about and manipulating objects, and health
and physical well-being, the Court does not address these domains.

1 learned. 20 C.F.R. § 416.926a(g) (2011); S.S.R. 09-3p. A limitation in this
2 domain may be found if, for example, a child is not reading, writing, or doing
3 arithmetic at appropriate grade level. Soc. Sec. Ruling 09-3p.; Title XVI:
4 Determining Childhood Disability-the Functional Equivalence Domain of
5 “Acquiring & Using Information” (S.S.A. Feb. 17, 2009). Further, poor grades or
6 inconsistent academic performance are among the more obvious indicators of a
7 limitation in this domain *provided they result from a medically determinable*
8 *mental or physical impairments.* SSR 09-3p at 3 (S.S.A. Feb. 17, 2009) (emphasis
9 added).

10 First, the ALJ found the objective evidence did not support marked
11 limitation. Tr. 29. The ALJ found, for example, that Plaintiff has difficulty
12 multiplying and dividing numbers over 10, but is otherwise able to perform math
13 without difficulty. Tr. 29 (citing Tr. 171) (in March 2012, social worker Ryan
14 Sadler indicated Plaintiff is unable to multiply and divide numbers over 10, but is
15 able to add and subtract numbers over 10, tell time, and understand money and
16 make change). The ALJ further found, relying on Mr. Sadler’s report, that Plaintiff
17 can read and understand stories in books, magazines and newspapers, and can spell
18 words of more than four letters. Tr. 29 (citing Tr. 171) (Mr. Sadler checked boxes
19 indicating Plaintiff was able to perform these tasks).

1 The ALJ also relied on the testimony of the reviewing psychologist when he
2 found less than marked limitation in this domain. Tr. 27-29. In assessing
3 functional equivalence, the Commissioner is to consider all the evidence
4 submitted, 20 C.F.R. § 416.926a(n), including test scores. 20 C.F.R. §§
5 416.926a(e)(4)(ii) (2011). Here, the ALJ relied on Dr. McKnight's testimony that
6 Plaintiff's test scores in the borderline to low average range of intellectual
7 functioning do not equate to marked limitations in this domain. Tr. 27-29 (citing
8 *e.g.*, Tr. 348 (in November 2012, examining psychologist Dr. Ethington opined
9 Plaintiff's test scores indicated borderline intellectual functioning); Tr. 53
10 (reviewing psychologist Dr. McKnight testified Mead School District records in
11 2010 showed a full scale IQ score of 80 (citing Tr. 253)); Tr. 53-54 (Dr. McKnight
12 opined that Plaintiff's test scores overall were "exceptionally average" and
13 indicated Plaintiff is "reasonably capable of performing academically"); Tr. 54 (Dr.
14 McKnight opined that none of Plaintiff's scores are two standard deviations below
15 the mean as required for disability in this domain); Tr. 54-55 (Dr. McKnight
16 opined Dr. Ethington's November 2012 neuropsychological evaluation results
17 indicated cognitive ability, as she found Plaintiff's thought process was logical and
18 goal-oriented, Plaintiff was able to recall six digits forward and five digits
19 backward, and concentration and attention were within normal limits (citing Tr.
20 345)).

1 Second, in assessing this domain, the ALJ found Plaintiff's "main problem
2 appears to be his disregard for attending school." Tr. 25. Limitation in this
3 domain may be shown by poor grades or inconsistent academic performance,
4 "provided they result from a medically determinable mental or physical
5 impairment(s)." S.S.R. 09-3p at 3 (S.S.A. Feb. 17, 2009).

6 Plaintiff had both poor grades and poor attendance. In May 2012, Plaintiff's
7 special education teacher opined Plaintiff had obvious and serious problems in
8 acquiring and using information, although she also opined Plaintiff attended school
9 less than forty percent of the time. Tr. 185-86. In October 2012, Dr. Ethington
10 noted Plaintiff's grades in seventh and eighth grade were D's and F's, and in ninth
11 and tenth grades, F's. Tr. 345. The ALJ found that, although testing, examinations
12 and the claimant's own statements showed he was cognitively and socially capable
13 of attending school, he simply chose not to go. Tr. 25. This indicates the ALJ
14 found Plaintiff's poor grades resulted from his absenteeism rather than physical or
15 mental impairment. Tr. 25.

16 There is substantial evidence of Plaintiff's absenteeism. For example, in
17 October 2012, Plaintiff told Dr. Ethington that he had "lost motivation for
18 graduating high school." Tr. 26 (citing Tr. 345). The ALJ noted that Plaintiff's
19 father, Lloyd Ferrel, told Dr. Ethington that Plaintiff missed a substantial amount
20 of school because Plaintiff was leaving campus after being dropped off. Tr. 26

1 (citing Tr. 344). Further, Mr. Ferrel also testified that Plaintiff left school on a
2 regular basis after Mr. Ferrel dropped him off. Tr. 24 (citing Tr. 62); *see also* Tr.
3 52 (reviewing psychologist Dr. McKnight testified that “attending or going to
4 school was a problematic issue for him.”). Additionally, one of Plaintiff’s teachers
5 noted in May 2012 that Plaintiff rarely attended class. Tr. 25 (citing Tr. 185)
6 (Plaintiff’s special education teacher, Sue Stookey noted that she did not have
7 enough information to respond regarding Plaintiff’s abilities “due to him rarely
8 showing up for class.”). Furthermore, while Ms. Stookey noted Plaintiff had
9 obvious problems in nearly all functional areas, she also pointed out that she did
10 not know very much about Plaintiff due to his poor attendance; accordingly, she
11 stated that she had based her assessment on information from previous school
12 records and limited interaction. Tr. 25 (citing 185-86; 188). The record supports
13 the ALJ’s finding that Plaintiff’s poor grades were more likely the result of poor
14 attendance rather than limitations from an impairment, as is required for finding
15 marked limitation in this domain.

16 Plaintiff contends the ALJ’s finding of less than marked limitation was
17 based solely on Mr. Sadler’s report, ECF No. 18 at 11-12, but contention is not
18 supported by the record. As noted, the record shows that the ALJ relied on the
19 objective evidence of Plaintiff’s cognitive capabilities (including the results of Dr.
20 Ethington’s testing and the opinion of the testifying psychologist), the evidence of

1 Plaintiff's frequent absenteeism, including the testimony of Plaintiff's father,
2 Plaintiff's own statements, and an assessment by one of Plaintiff's teachers, in
3 addition to Mr. Sadler's report, when he assessed limitations in this domain.

4 Plaintiff next contends the ALJ should have credited the opinions of two
5 examining sources, Dr. Charbonneau and Dr. Pollack, when he assessed Plaintiff in
6 this domain. ECF No. 18 at 11-12. Dr. Charbonneau is not, as Plaintiff contends,
7 an examining physician, because his report is not in the record. In support of his
8 contention, Plaintiff cites a November 2010 record from the Mead School District.
9 ECF No. 18 at 11 (citing Tr. 249). However, this document is not Dr.

10 Charbonneau's opinion or report. Instead, it is a document sent from the Mead
11 School District to the Spokane Public Schools as part of a student transfer. Tr.
12 245-67. Included is an Individualized Education Plan (IEP) for Plaintiff that
13 references other records, including a report by Dr. Charbonneau; however, the
14 actual report is not attached.⁵ Notably, the reference to Dr. Charbonneau indicates

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16 ⁵ The IEP indicated that review "of the health history was completed by Dr. Gabe
17 Charbonneau, Primary Care Provider." Tr. 249. The person completing the IEP
18 indicated that, due to Plaintiff's "history of [foster care] placement, Dr.
19 Charbonneau was likely able to provide the most accurate health history. Concerns
20 regarding focus, concentration and peer/teacher relationships were reported." Tr.

1 a diagnosis and areas of “concern,” but no specific limitations are assessed. Tr.
2 249. Here, the Court does not discern any error by the ALJ in failing to “consider”
3 the single-sentence reference to Dr. Charbonneau’s report. First, his report is not
4 part of the record, and second, the reference to Dr. Charbonneau’s report does not
5 include any functional limitations. *See, e.g., Turner v. Comm’r of Soc. Sec.*
6 *Admin.*, 613 F.3d 1217, 1223 (9th Cir. 2010) (where physician’s report did not
7 assign any specific limitations or opinions in relation to an ability to work, “the
8 ALJ did not need to provide clear and convincing reasons for rejecting [the] report
9 because the ALJ did not reject any of [the report’s] conclusions”); *see also Kay v.*
10 *Heckler*, 754 F.2d 1545, 1549 (9th Cir. 1985) (the “mere diagnosis of an
11 impairment ... is not sufficient to sustain a finding of disability.”).

12 Similarly, in support of his contention the ALJ should have credited more
13 than Mr. Sadler’s opinion, Plaintiff contends the ALJ should have credited Dr.
14 Pollack’s opinion with respect to the domain of acquiring and using information.
15 ECF No. 18 at 12. In April 2014, examining psychologist Dennis Pollack, Ph.D.,
16
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18 249. Accordingly to the IEP, Dr. Charbonneau reported a diagnosis of ADHD on
19 November 10, 2010, and reported this as a condition which may negatively impact
20 academic skill acquisition, attention, concentration, and communication. Tr. 249.

1 assessed, in part, “marked limitations in cognitive functioning.” Tr. 28 (citing Tr.
2 393).

3 First, the ALJ gave this opinion little weight because it was inconsistent with
4 Dr. Pollack’s own test results. Tr. 28. An ALJ may reject an opinion that is
5 inconsistent. *Connett v. Barnhart*, 340 F.3d 871, 875 (9th Cir. 2003) (affirming
6 ALJ’s rejection of physician’s opinion as unsupported by physician’s treatment
7 notes). The ALJ found that the assessed marked cognitive limitations are
8 inconsistent with the results of tests administered by Dr. Pollack. Tr. 28. The ALJ
9 found test results showed intelligence in the low average range, scores that do not
10 equate to marked limitations. Tr. 28 (citing Tr. 393) (Dr. Pollack opined Plaintiff’s
11 results on the Wechsler Adult Intelligence Scale IV yielded a full scale IQ of 80, in
12 the low average range and at the 9th percentile); (citing Tr. 55-56) (Dr. McKnight
13 opined Dr. Pollack’s testing yielded “very average” results, test results did not
14 reach two standard deviations below the mean, and limitation in this domain is less
15 than marked). This was a specific, legitimate reason to give limited weight to Dr.
16 Pollack’s opinion.

17 Next, the ALJ gave Dr. Pollack’s opinion little weight because it is
18 inconsistent with the record, including other objective findings. Tr. 28. An ALJ
19 may discredit a physician’s opinions that are unsupported by the record as a whole
20 or by objective medical findings. *Batson v. Comm’r of Soc. Sec. Admin.*, 359 F.3d

1 1190, 1195 (9th Cir. 2004). The ALJ found, for example, that the results of tests
2 administered by Dr. Ethington were, like Dr. Pollack's, in the low average range.
3 Tr. 26 (citing Tr. 346-48) (Dr. Ethington's test results); Tr. 27 (citing Tr. 54-55)
4 (Dr. McKnight's interpretation of these scores as in the low average range).

5 This was a reasonable interpretation of the evidence. Since the evidence is
6 susceptible to more than one rational interpretation, the ALJ's conclusion must be
7 upheld. *See Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005).

8 2. *Attending and Completing Tasks*

9 The ALJ found less than marked limitation in attending and completing
10 tasks. Tr. 30. The domain of "attending and completing tasks" is concerned with
11 a child's ability to focus and maintain attention and ability to see tasks to
12 completion. SSR 09-4p. A typically functioning school-age child is expected to
13 (1) focus attention in a variety of situations; (2) concentrate on details and avoid
14 careless mistakes; (3) change activities without distracting others; (4) sustain
15 attention sufficiently to participate in group sports, read alone, or complete family
16 chores; and (5) complete a transition task without extra reminders or supervision.
17 SSR 09-4p.

18 In assessing the domain of attending and completing tasks, the ALJ found
19 that although Plaintiff refuses to attend school, there is little evidence that he does
20 not attend and complete tasks in all other facets of his life. Tr. 30 (citing Tr. 174).

1 The ALJ found, for example, that Plaintiff was able to keep busy on his own;
2 finished what he started; completed homework on time when he did attend school;
3 and performed household chores every day. Tr. 30 (citing Tr. 174) (Mr. Sadler
4 checked boxes indicating Plaintiff had these abilities). Moreover, the ALJ relied
5 on the testimony of Plaintiff's father, who stated that Plaintiff is the best helper of
6 his father's three sons, further indicating the ability to attend and complete tasks.
7 Tr. 30 (citing Tr. 64) (Mr. Ferrel testified Plaintiff had his chores "down pat," did
8 his dishes every day, helped fold clothes, and is probably the best helper of his
9 three boys).

10 The ability to sustain attention sufficiently to complete family chores, for
11 example, demonstrates functioning in this domain. S.S.R. 09-4p (sustain attention
12 sufficiently to . . . complete family chores). The ALJ also found that Plaintiff had
13 a less than marked limitation in attending and completing tasks in part because
14 Plaintiff "completed his homework on time when he does attend school." Tr. 30
15 (citing Tr. 174). As discussed, the ALJ noted Plaintiff's attendance issues. Tr. 25
16 (citing Tr. 185-86, 188) (Ms. Stookey "noted [Plaintiff] had obvious problems in
17 nearly all functional areas, but also noted she did not know very much about the
18 claimant due to his poor attendance."). Although there is conflicting evidence (*see*,
19 *e.g.*, Tr. 259) (in May 2011, teachers reported Plaintiff had missed 19 assignments
20 since the start of fourth quarter; rarely or never turned in assignments on time; and

1 specially designed instruction was recommended), the ALJ's interpretation of the
2 evidence was reasonable. Since the evidence is susceptible to more than one
3 rational interpretation, the ALJ's conclusion must be upheld. *See Burch*, 400 F.3d
4 at 679. The ALJ's finding of less than marked limitation in the domain of
5 attending and completing tasks is supported by the record.

6 3. *Interacting and Relating With Others*

7 The ALJ found Plaintiff has less than marked limitation in interacting and
8 relating with others. Tr. 31. The domain of "interacting and relating with others"
9 is concerned with a child's ability to initiate and sustain emotional connections
10 with others, cooperate with others, comply with rules, respond to criticism, and
11 respect and take care of the possessions of others. 20 C.F.R. § 416.926a(i) (2011).
12 The Regulations also provide a non-exhaustive list of "[e]xamples of limited
13 functioning in interacting and relating with others, which includes, among others, a
14 lack of close friends, difficulty playing games or sports with rules, and difficulty
15 communicating with others." 20 C.F.R. § 416.926a(i)(3) (2011).

16 First, the ALJ relied, in part, on Mr. Sadler's report that indicated Plaintiff
17 had limited communicative difficulties. Tr. 31 (citing Tr. 170). Specifically, Mr.
18 Sadler noted that Plaintiff can answer phone calls, deliver phone messages, repeat
19 stories that he has heard, tell jokes, use sentences, ask for what he needs, talk with
20 his family and talk with his friends. Tr. 31 (citing Tr. 170). The ALJ noted that

1 Mr. Sadler indicated Plaintiff only has difficulty communicating when attempting
2 to explain why he did something. Tr. 31 (citing Tr. 170). The ALJ, again relying
3 on Mr. Sadler, further found Plaintiff has friends his own age and no difficulty
4 making friends; he has some trouble getting along with his teachers but generally
5 gets along with adults and his siblings. Tr. 31 (citing Tr. 172).

6 Next, the ALJ relied on Plaintiff's reports that he enjoyed being around his
7 friends. Tr. 31 (citing Tr. 347) (Plaintiff told Dr. Ethington he "has a negative
8 attitude toward school and only enjoys being around friends at school.").

9 Moreover, the ALJ relied on Plaintiff's father statement that Plaintiff had little
10 difficulty getting along with others and he had only mild concerns about Plaintiff
11 being excluded or marginalized by his peers. Tr. 31 (citing Tr. 347). Finally, the
12 ALJ noted Plaintiff was consistently cooperative and polite during treatment
13 sessions and examinations. Tr. 31; *see, e.g.*, Tr. 345 (Dr. Ethington described
14 Plaintiff as "quiet and polite."); Tr. 391 (Dr. Pollack described Plaintiff as
15 cooperative throughout the interview and testing). Although Plaintiff's special
16 education teacher opined in May 2012 that Plaintiff had "obvious problems"
17 interacting and relating with others, she also noted Plaintiff's frequent absenteeism.
18 Tr. 188. The ALJ's conclusion that Plaintiff's social abilities are consistent with
19 less than marked limitations in interacting and relating with others is supported by
20 the record. Tr. 31.

1 Plaintiff cites other evidence he alleges shows marked limitation in this
2 domain. ECF No. 18 at 13. For example, Plaintiff cites teachers' reports in
3 November 2010 and May 2011, which reported Plaintiff was withdrawn,
4 depressed, and had behavioral symptoms and conduct problems. ECF No. 18 at 13
5 (citing Tr. 251, 259). This may indicate a degree of limitation in interacting and
6 relating with others, but the extent and duration of any limitation is unclear from
7 these references. As another example, Plaintiff cites his own statements. ECF No.
8 18 at 13 (citing Tr. 251) (in a self-report Plaintiff completed in November 2010,
9 there were no scales in the elevated or clinical range). This does not support
10 Plaintiff's contention that he has marked limitation in interacting and relating with
11 others. By way of further example, Plaintiff cites two statements he made to
12 treating therapist Mr. Stein. First, Plaintiff told Mr. Stein that his goals included
13 not getting in trouble at school, continuing to get along with his housemates and
14 doing what his foster parents told him to do. ECF No. 18 at 13 (citing Tr. 268,
15 270, 272). Second, Plaintiff cites his June 2012 statement to Mr. Stein that he was
16 recently suspended from school and that he got in trouble at home for arguing with
17 his brother. ECF No. 18 at 13 (citing Tr. 337).

18 As more examples, Plaintiff cites his father's somewhat contradictory
19 statements. ECF No. 18 at 13. In June 2012, Mr. Ferrel testified that two to three
20 times a week Plaintiff got angry "mainly with his brothers," including an occasion

1 when Plaintiff pulled a knife on his brother. Tr. 65. However, in October 2012,
2 Mr. Ferrel told Dr. Ethington Plaintiff was usually pretty quiet; did not like being
3 told he was wrong and could be prone to anger; but was otherwise cooperative,
4 such as with chores. Tr. 346. This evidence is contradictory and does not
5 undermine confidence in the ALJ's assessment of the evidence.

6 Plaintiff contends two of his foster parent's statements in 2010 indicate
7 marked limitation in interacting and relating with others. ECF No. 18 at 13. In
8 July 2010, Plaintiff's foster parent described Plaintiff in part, as having flat affect,
9 over-reacting and internalizing. Tr. 288. In November 2010, his foster parent
10 indicated Plaintiff had clinically significant behaviors in aggression, conduct
11 problems, and behavioral symptoms. Tr. 251. Finally, Plaintiff contends treating
12 therapist Mr. Stein opined Plaintiff had poor insight. ECF No. 18 at 13 (citing Tr.
13 338). Since the evidence here is susceptible to more than one reasonable
14 interpretation, the ALJ's conclusion must be upheld. *See Burch*, 400 F.3d at 679.
15 The ALJ's finding of less than a marked limitation in the domain of interacting and
16 relating with others is supported by the record.

17 4. *Caring for Self*

18 The ALJ found less than a marked limitation in the domain of caring for self.
19 Tr. 32. The domain of "caring for self" is concerned with a child's ability to
20 maintain a healthy emotional and physical state, including appropriately meeting

1 physical and emotional wants and needs, coping with stress and changes, and
2 caring for health, possessions, and living area. 20 C.F.R. § 416.926a(k) (2011).
3 Limitations in this domain are shown by inappropriate personal hygiene, self-
4 injurious behavior, disturbances in eating or sleep patterns, and inability to
5 spontaneously pursue enjoyable activities. 20 C.F.R. § 416.926a(k)(3)(iii)-(vi)
6 (2011).

7 The ALJ noted Plaintiff “has some trouble remembering to take care of his
8 personal hygiene,” but he is physically and mentally capable of managing his own
9 personal hygiene. Tr. 31-32 (citing Tr. 173). Mr. Sadler noted that Plaintiff is
10 “forgetful when it comes to his hygiene,” and that he will have periods of time
11 when he will not bathe and has an odor of urine, and he needs reminders to take
12 care of his personal hygiene needs. Tr. 183. However, this appears to be the only
13 evidence of difficulty in this domain.

14 The ALJ found Plaintiff had little difficulty caring for himself. Tr. 33. For
15 example, the ALJ found Plaintiff prepared meals for himself. Tr. 33 (citing Tr.
16 173) (Mr. Sadler indicated Plaintiff can cook a meal for himself). The ALJ found,
17 as additional examples, that Plaintiff washed and put away his clothes;
18 remembered to take his prescribed medication; knew how to use public
19 transportation and was able to get to school on time. Tr. 33 (citing Tr. 173) (Mr.
20 Sadler indicated Plaintiff had these abilities). The ALJ further found that Plaintiff

1 kept out of trouble, avoided accidents, obeyed rules, and asked for help when
2 needed. Tr. 33 (citing Tr. 173) (Mr. Sadler opined Plaintiff had these abilities).
3 Moreover, as even more examples, the ALJ found Plaintiff was not markedly
4 limited in this domain because Plaintiff was also able to look out for his younger
5 brother. Tr. 33. The ALJ found Plaintiff told Dr. Pollack that he walks his
6 younger brother to the bus stop in the morning and picks him up in the evening.
7 Tr. 33 (citing Tr. 393).

8 Plaintiff challenges the ALJ's finding by citing evidence that is essentially
9 indicative of behavioral problems. ECF No. 18 at 14 (citing e.g., Tr. 259 (teacher
10 reports indicated discipline referrals for defiance); Tr. 338 (school suspension); Tr.
11 274 (reports of Plaintiff stealing)). These records do not demonstrate that the
12 ALJ's conclusion was unsupported. The ALJ's interpretation of the evidence was
13 reasonable. Since the evidence is susceptible to more than one rational
14 interpretation, the ALJ's conclusion must be upheld. *See Burch*, 400 F.3d at 679.

15 **B. Medical Opinion Evidence**

16 Next, Plaintiff contends the ALJ failed to consider the opinion of Dr.
17 Charbonneau and improperly discredited the opinion of Dr. Pollack. ECF No. 18
18 at 3-7.

19 There are three types of physicians: "(1) those who treat the Plaintiff
20 (treating physicians); (2) those who examine but do not treat the Plaintiff

(examining physicians); and (3) those who neither examine nor treat the Plaintiff but who review the Plaintiff's file (nonexamining or reviewing physicians).” *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (brackets omitted). “Generally, a treating physician’s opinion carries more weight than an examining physician’s, and an examining physician’s opinion carries more weight than a reviewing physician’s.” *Id.* “In addition, the regulations give more weight to opinions that are explained than to those that are not, and to the opinions of specialists concerning matters relating to their specialty over that of nonspecialists.” *Id.* (citations omitted).

If a treating or examining physician’s opinion is uncontradicted, an ALJ may reject it only by offering “clear and convincing reasons that are supported by substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005). “However, the ALJ need not accept the opinion of any physician, including a treating physician, if that opinion is brief, conclusory and inadequately supported by clinical findings.” *Bray v. Comm’r Soc. Sec. Admin.*, 554 F.3d 1219, 1228 (9th Cir. 2009) (internal quotation marks and brackets omitted). “If a treating or examining doctor’s opinion is contradicted by another doctor’s opinion, an ALJ may only reject it by providing specific and legitimate reasons that are supported by substantial evidence.” *Bayliss*, 427 F.3d at 1216 (citing *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995)).

1 1. *Dr. Charbonneau*

2 Gabe Charbonneau, M.D., is a primary care provider who is cited in an IEP
3 with the Mead School District dated November 11, 2010. Tr. 249. As noted, Dr.
4 Charbonneau's report is not part of the record; it is merely referenced. Dr.
5 Charbonneau apparently diagnosed ADHD. Tr. 249. The IEP indicates that Dr.
6 Charbonneau reported concerns regarding Plaintiff's focus, concentration, and
7 peer/teacher relationships, and indicated ADHD is a condition which "may
8 negatively impact academic skill acquisition, attention, concentration, and
9 communication." Tr. 249. The ALJ did not address the IEP references to Dr.
10 Charbonneau's report.

11 Plaintiff contends Dr. Charbonneau's opinion is particularly relevant to the
12 first domain of acquiring and using information. ECF 18 at 11. However, as
13 previously discussed, the Court discerns no error by the ALJ in failing to
14 "consider" Dr. Charbonneau's opinion because it was not part of the record and he
15 did not assess any limitations. *See, e.g., Turner*, 613 F.3d at 1223 (where
16 physician's report did not assign any specific limitations or opinions in relation to
17 an ability to work, "the ALJ did not need to provide 'clear and convincing reason'
18 for rejecting [the] report because the ALJ did not reject any of [the report's]
19 conclusions"); *see also Kay*, 754 F.3d at 1549 (the "mere diagnosis of an

1 impairment ... is not sufficient to sustain a finding of disability.”). Here, the ALJ
2 did not err in failing to discuss the reference to Dr. Charbonneau’s report.

3 2. *Dr. Pollack*

4 Dennis Pollack, Ph.D., performed a psychological evaluation of Plaintiff and
5 thereafter rendered a report on April 12, 2014. Tr. 26 (citing Tr. 391-99). He
6 diagnosed attention deficit hyperactivity disorder (ADHD), cognitive disorder not
7 otherwise specified (NOS), and anxiety disorder not otherwise specified (NOS).
8 Tr. 396. Further, Dr. Pollack opined that Plaintiff has marked limitations in
9 cognitive functioning, social functioning, and behavioral functioning. Tr. 397-98.
10 Dr. Pollack noted that on the Wechsler Adult Intelligence Scale-IV, Plaintiff’s IQ
11 test result was 80, a score that fell in the low average range in the ninth percentile.
12 Tr. 393. The ALJ gave minimal weight to Dr. Pollack’s opinion. Tr. 28.

13 Because Dr. Pollack’s opinion was contradicted by Dr. McKnight, Tr. 57,
14 the ALJ was required to provide specific and legitimate reasons for rejecting Dr.
15 Pollack’s opinion. *Bayliss*, 427 F.3d at 1216.

16 The ALJ found Dr. Pollack’s assessed limitations were inconsistent with Dr.
17 Pollack’s own examination and test results. Tr. 28. A medical opinion may be
18 rejected by the ALJ if it is conclusory, contains inconsistencies, or is inadequately
19 supported. *Bray*, 554 F.3d at 1228. Factors relevant to evaluating any medical
20 opinion include the amount of relevant evidence that supports the opinion, the

1 quality of the explanation provided in the opinion, and the consistency of the
2 medical opinion with the record as a whole. 20 C.F.R. § 416.927(c) (2012);
3 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1042 (9th Cir. 2007); *Orn v. Astrue*, 495
4 F.3d 625, 631 (9th Cir. 2007).

5 The ALJ pointed out that the results of Plaintiff's IQ testing administered by
6 Dr. Pollack were inconsistent with his assessed limitations. Tr. 28; *cf.* Tr. 393
7 (Plaintiff's IQ score was 80, in the low average range, indicative of less than
8 marked limitations) *with* Tr. 397 (Dr. Pollack assessed marked limitations in
9 cognitive functioning). The ALJ further noted Dr. Pollack observed that Plaintiff's
10 scores in 2014 were better than they had been in 2012. Tr. 27 (citing Tr. 394)
11 (noting Plaintiff's Wechsler Adult Intelligence Scale-IV scores "are better than
12 those found in 2012."). The ALJ is correct that this finding by Dr. Pollack is also
13 inconsistent with assessed marked cognitive limitations, since it is indicative of
14 improvement rather decline in cognitive functioning. This was a specific,
15 legitimate reason to give limited weight to Dr. Pollack's opinion.

16 Next, the ALJ gave Dr. Pollack's opinion limited weight because it is
17 unsupported by and inconsistent with the record as a whole. Tr. 28. The ALJ
18 found, for example, that Dr. Pollack's assessed marked limitation in social
19 functioning, Tr. 398, was unsupported by the record because Plaintiff never
20 reported marked difficulties in getting along with others. Tr. 28. The assessed

1 limitation is unsupported because treatment records fail to show that Plaintiff told
2 treatment providers that he experienced difficulties in social functioning. An ALJ
3 may reject an opinion that is unsupported by the record as a whole or by objective
4 findings. *Batson*, 359 F.3d at 1195. For example, Plaintiff in counseling
5 expressed that he wanted to not get “in trouble at school,” and was described by his
6 foster parent as “really personable”; there were no reported difficulties in social
7 functioning. Tr. 268 (in March 2012 treatment provider Bret Stein, M.A., noted
8 Plaintiff expressed the desire to attend classes and stay out of trouble at school; his
9 guardian described Plaintiff as personable and did not report that he experienced
10 difficulties in social functioning). The ALJ further found, as another example, that
11 Plaintiff was consistently cooperative and polite during treatment sessions and
12 examinations. Tr. 28, *see* Tr. 308 (in February 2012, treatment provider Mary
13 Gallegos, ARNP, noted Plaintiff was pleasant and cooperative); Tr. 310 (in April
14 2011, treatment provider Angela Haugo, D.O., noted Plaintiff was alert, answered
15 questions appropriately, and was cooperative). The ALJ also found, as yet another
16 example, that Plaintiff had friends at school and no reported difficulty making new
17 friends. Tr. 28, *see* Tr. 347 (Plaintiff told Dr. Ethington that he “only enjoys being
18 around friends at school” and reported an average level of social interest).

19 Moreover, the ALJ additionally found, as still another example, that
20 Plaintiff’s father opined Plaintiff has no difficulties with social functioning. Tr. 28

(citing Tr. 346) (Dr. Ethington noted Mr. Ferrel rated Plaintiff's behaviors within the average range); Tr. 347 (Mr. Ferrel told Dr. Ethington Plaintiff does everything that is asked of him except go to school, and he had no complaints regarding Plaintiff's behavior, other than his refusal to attend school); Tr. 64 (Mr. Ferrel testified Plaintiff's medication keeps him stable). The record as a whole, including Plaintiff's own statements, contradicts Dr. Pollack's assessed marked limitations. This was a specific, legitimate reason to give limited weight to Dr. Pollack's opinion.

3. Other opinions

Dr. McKnight, a reviewing psychologist, testified at the hearing. He opined that Plaintiff did not meet or equal a listed impairment and limitations in all domains were less than marked. Tr. 57. He further opined that Plaintiff demonstrated the ability to perform reasonably well academically. Tr. 27 (citing *e.g.*, Tr. 54 (Dr. McKnight testified all scores were "exceptionally average," referring to November 2010 testing)). The ALJ gave Dr. McKnight's opinion significant weight. Tr. 27. Plaintiff does not challenge the weight the ALJ gave Dr. McKnight's opinion; instead, Plaintiff simply contends the ALJ erred when he relied solely on Mr. Sadler's report and failed to credit the opinions of Dr. Charbonneau and Dr. Pollack.

1 In any event, the ALJ credited Dr. McKnight's opinion because Dr.
2 McKnight "had the opportunity to review all of the Plaintiff's medical records and
3 ask him questions at the hearing." Tr. 27. The ALJ also found Dr. McKnight's
4 opinion was largely consistent with the objective medical evidence that showed an
5 improvement in Plaintiff's condition with prescribed medication. Tr. 28; *see, e.g.*,
6 Tr. 310 (in April 2011, Plaintiff appeared stable on his medications); Tr. 329-30
7 (on May 21, 2012, Plaintiff was seen for medication management of ADHD, and
8 medications were continued as prescribed). Because Dr. McKnight had the
9 opportunity to review all of the records and ask Plaintiff questions at the hearing,
10 and because the objective evidence of improvement in Plaintiff's condition was
11 consistent with Dr. McKnight's opinion, the ALJ was entitled to give greater
12 weight to his opinion than Dr. Pollack's.

13 For the foregoing reasons, the ALJ provided specific and legitimate reasons,
14 supported by substantial evidence, to grant little weight to Dr. Pollack's assessed
15 limitations. In addition, contrary to Plaintiff's contention, the ALJ did not rely
16 solely on Mr. Sadler's report when he weighed the evidence of Plaintiff's
17 limitations. Instead, the ALJ considered the opinions of the treating, examining
18 and reviewing sources, including Mr. Sadler, as well as the lay testimony,
19 including of Plaintiff's father, when the ALJ considered Plaintiff's limitations.
20 Moreover, while Plaintiff generally cites to evidence in selected opinions that

1 could be considered more favorable to Plaintiff, and vaguely asserts that the ALJ
2 failed to consider those findings (ECF No. 18 at 11-14), Plaintiff has not argued
3 with specificity that the ALJ's rejection, to the extent opinions were rejected, was
4 unreasonable or not based on substantial evidence. *See Burch*, 400 F.3d at 679
5 (where evidence is susceptible to more than one rational interpretation, the court
6 must uphold the ALJ's conclusion).

7 **CONCLUSION**

8 Having reviewed the record and the ALJ's findings, this Court concludes the
9 ALJ's decision is supported by substantial evidence and free of harmful legal error.

10 **IT IS ORDERED:**

11 1. Plaintiff's Motion for Summary Judgment, ECF No. 18, is **DENIED**.

12 2. Defendant's Motion for Summary Judgment, ECF No. 20, is **GRANTED**.

13 The District Court Executive is directed to file this Order, enter
14 JUDGMENT FOR THE DEFENDANT, provide copies to counsel, and **CLOSE**
15 **THE FILE**.

16 DATED August 22, 2017.

17 s/Mary K. Dimke
18 MARY K. DIMKE
19 UNITED STATES MAGISTRATE JUDGE
20